344

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1136.

J. T. WEBBER, PLAINTIFF IN ERROR,

vs.

THE STATE OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JANUARY 3, 1881.

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there is no error in the said judgment. Therefore it is considered that said judgment of the said circuit court of Henrico County be affirmed, & that the commonwealth recover against the plaintiff in error her costs by her about her defence of said writ of error here expended, & thirty dollars for her damages; which is ordered to be certified to the said circuit court of Henrico County.

☞ The opinion referred to in the foregoing entry as being "for reasons stated in writing & filed with the record," is as follows, viz:

The defendant was convicted in the county court of Henrico of selling and offering to sell in said county certain machines known as the "Singer sewing machine" without having first obtained a license according to law, and was sentenced to pay a fine of $50. To that judgment he applied for and obtained a writ of error from the circuit court, which affirmed the judgment of the county court. A writ of error was awarded by this court to the judgment of the circuit court. On the trial in the county court it was proved that the Singer Manufacturing Company is a corporation incorporated by the laws of New Jersey; that it has a place of business in the city of Richmond, where it keeps a stock of sewing machines; that the company is duly licensed by the State of Virginia, having paid a license tax of $322, and is therefore a resident merchant of this State, and taxed as such, and the defendant is its authorized agent, and as such has sold and delivered at the time of sale since May 1, 1880, machines to divers citizens of Henrico County. The question before us is whether the defendant, upon this state of facts, was properly convicted of the offence for which he was indicted.

In determining this question, it will be necessary to examine the provisions of various statutes relating to the assessment and collection of the public revenues. In one or more of these statutes it is expressly declared that every license granting authority to any person to engage in any business, employment, or profession shall designate the place of such business, employment, or profession, unless otherwise expressly provided. And engaging in or exercising any such licensed business elsewhere than at such designated place is declared to be without license. And no person is allowed the privilege of selling throughout the State under one license, except by special provisions of law. (Sections 88–94, pages 30, 31, Virginia Revenue Laws, 1877.) These provisions, it will be observed, are very broad in their operation, and apply as well to merchants as to the owners of articles or machines manufactured in this State, or in other States and Territories. A careful examination of the revenue laws fails to show any enactment allowing either of these classes of persons the privilege of selling elsewhere than at their designated places of business, unless it be the statutes relating to sample merchants, found in the 34th and 35th sections, pages 61 and 62, of the revenue laws. These sections declare that any person who shall sell, or offer to sell, any description of goods, wares, or merchandise by sample card, description, or other representation, verbal or otherwise, shall be deemed a sample merchant. Any person engaging in such business must obtain a license which confers upon him the privilege of selling anywhere in his State. He may, under his license, appoint one agent or salesman to sell in his place. But for any additional agent or salesman employed to sell he must pay an additional tax of fifty dollars. It is also provided that nothing in either of the sections shall be so construed as to prevent any resident merchant or manufacturer from exhibiting a specimen of his goods, wares, or merchandise anywhere in the State, or the exhibition of a sample of any property which the person exhibiting is authorized to sell without a sample-mer-

chant license. And at the conclusion of the 35th section is the following provision: "Nothing in this or the preceding section (34th) shall be construed to require any licensed merchant or manufacturer who has paid a license tax of not less than one hundred dollars to pay an additional tax for selling, or offering to sell, by sample, either by himself or his agent." Under this provision the licensed merchant or manufacturer who pays a tax of $100 may sell by sample himself, or he may sell by agents. It is very true the language quoted does not of itself confer express authority so to sell, but is rather in the form of an exception or proviso. It must be remembered, however, that any person is privileged to sell goods, wares, and merchandise until prohibited by some statuary enactment, and but for the 34th and 35th sections any person may sell by sample to any extent. When, therefore, the licensed merchant or manufacturer is excepted out of the operation of these sections, he stands precisely as though they had never been adopted. If these sections do not apply to him, there is no law that does, and he may sell by sample himself in any part of the State, or he may appoint any number of agents to sell for him without the payment of any additional tax. In this respect he stands upon much higher ground than the mere sample merchant, who for every additional agent is required to pay a tax of $50. This discrimination, if it may be so termed, is founded upon sound considerations of public policy. The sample merchant is generally a non-resident, and beyond the small tax he pays into the Treasury contributes nothing to the wealth and resources of the State, whilst he is constantly withdrawing a large amount of capital from our midst as well as injuriously affecting domestic trade and enterprise. On the other hand, the resident merchant pays not only the tax upon his business, but generally he pays upon other subjects of taxation necessarily employed in that business, and at the same time he is a substantial contributor to the wealth of the State in time of peace and her strength in time of war. We repeat, therefore, the statutes already cited have made a distinction between a licensed merchant or manufacturer who pays a tax of one hundred dollars and the mere sample merchant. It was conceded by the Attorney-General that this distinction has been recognized and acted upon by the several departments of the government since 1874 until very recently, and although the legislature has been repeatedly in session in the mean time, it has never interfered to change the rule of construction so adopted. We think the courts ought not to do so, but leave the whole matter to the legislature, where it properly and rightfully belongs.

4 We are now to inquire what are the rights and privileges of a sample merchant; for, whatever they are, they may be exercised by the licensed merchant or manufacturer who has paid a tax of $100. The 34th section defines a sample merchant. He is one "who sells or offers to sell any description of goods, wares, or merchandise by sample-card, description, or other representation, verbal or otherwise, or any agent for the sale or collection of orders by sample or description-list such as is prescribed by the C. O. D. Supply Company of America or any similar company." The word "sample, both in its legal and popular acceptation, means that which is taken out of a large quantity as a fair representation of the whole—a part shown as a specimen." Indeed, upon the well-known maxim of noscitur asociis, the word "sample," in its connection with "card" or "representation," shows what was intended by the legislature. The history and the reasons of the legislature contained in the 34th and 35th sections are perfectly well known. The object was to provide a remedy for a constantly-increasing evil

growing out of the influx of multitudes of agents and salesmen from the commercial cities of the North traversing the State with sample cards and description-lists, and receiving orders to be filled by their respective employers. The traffic yielded no revenue to the State, and was deeply injurious as well as unjust to the licensed merchant and manufacturer. It is hardly to be supposed that the legislature, in providing a remedy for this abuse, intended to confer new privileges upon the licensed merchant, and to allow him to sell as a merchant or pedler his goods by retail in any part of the State. If the right to sell by sample carries with it the right to sell and deliver as a retail merchant or as a pedler, every licensed merchant or manufacturer who pays a tax of $100 may establish a place of business in each county in the State, and there retail his goods, or he may appoint any number of agents to peddle his goods from place to place, and sell them without restraint or limitation. The result would be that a license to sell at one place in effect confers authority to sell at any other place, according to the inclination or interest of the granter of the license. A person licensed as a merchant to sell goods at a particular place may, of course, receive orders from his customers and others in any and every part of the State, may fill these orders, and forward the goods accordingly. It is the constant practice, and no one presumes to question its legality. And so a merchant or manufacturer paying a tax of $100 may send his agents into any county supplied with sample-cards or descriptive-lists, and may receive and fill orders for furnishing and delivering goods so sold by sample-card or description.

And while it is conceded to be no easy task precisely to define where the privilege of the sample merchant begins or where it terminates, it is very clear that a person, whether he be owner or agent, who has a place of business in a county or town and there sells and delivers the articles at the time of sale, or a person who carries his goods from place to place and sells and delivers the article at the time of sale, is not selling by sample-card or description. Such a person may be a retail merchant or a pedler, but he is not a sample merchant. And this is precisely what was done by the defendant. Either he had a place of business in Henrico County, where he kept the machines for sale and delivery at the time of sale, or he carried them from place to place and sold and delivered wherever he would find a purchaser. In either case he was not selling by sample. This proposition seems to be so free from difficulty it would have been passed by without discussion but for the earnest and elaborate argument of the learned counsel for the defence.

It is claimed, however, that although the defendant may be guilty of violating the statutes relating to sample merchants, or the statute relating to pedlers, he cannot be convicted in this case, because he is not indicted under those statutes, but under what is known as the 45th section of the revenue laws, 1878, page 65. That section provides that any person who shall sell, or offer to sell, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or who shall take orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or Territories. The ground taken by defendants is "that this section contains an express exception in favor of the owner, who has paid a license tax; that this exception creates an inevitable implication that such owner may sell, and if he may sell his agent may do so under the decision in Myerdock case." (26 Gratt., 988.) The argument is plausible, but it is not sound. In the first place the forty-fifth section was not designed to confer rights and privileges upon any

class of persons, either the owner or venders of goods, wares, and merchandise. Those rights are defined by other statutes. The sole object of the 45th section was to restrain—to provide some remedy for an evil growing out of the sale in this State of articles manufactured in other States brought here by persons who were the agents of others, or, if they were the owners, paid no tax for the privilege. All such persons are denominated agents by the statute, and are required to take out license in each county in which they sell. But if the construction of defendant's counsel be correct—if the 45th section is to be read as of itself conferring upon the owner who has paid a merchant's tax authority to sell—we have this anomalous condition of things. Under the 34th and 35th sections a resident merchant who pays a $100 tax may sell by sample; but the payment of the tax is a condition precedent to the exercise of the privilege. According to the interpretation now sought to be put upon the 45th section, any licensed merchant who is the owner, whether he has paid $20 or $100, may sell not merely by sample, but he may sell by retail as a merchant or as a pedler in every county or town in the State without limit or restraint. The result is that whilst the payment of $100 tax is necessary in order to sell by sample under the 45th section, according to the present pretension any resident merchant who is the owner of the goods he offers for sale may sell without limit as to time or place. It is impossible that a construction which leads to such consequences can be correct. It is very true, as was held by this court in the Myerdock case, whenever the merchant is authorized to sell at a particular place he may appoint an agent to sell there for him. But it is equally true that the merchant cannot confer upon an agent authority to sell where he himself cannot lawfully sell. If, therefore, the Singer Manufacturing Company cannot, under its Richmond license, sell in Henrico except by sample, it cannot, of course, appoint an agent to sell there in its place. So that at last we are brought back to the inquiry, "What are the privileges of a resident merchant who has paid a tax of one hundred dollars?" These privileges, whatever they may be, are defined not by the 45th section, but by other provisions already cited. But although the owner is not punishable under the 45th section, because he is expressly excepted from its operation, there is no such exception in favor of any other person, not even an agent of the owner. For whilst the law protects the agent in selling where the principal may lawfully sell, it does not so protect him in selling where the principal himself is prohibited from selling. It is very true, also, that the 45th section is silent as to the mode and manner of selling. It is a matter, however, of no importance. All manner of selling is prohibited unless the party can show that the privilege is conferred upon him under other statutes, as, for example, that he is a merchant licensed to sell at the place of sale, or that he is a resident manufacturer, or that he is authorized to sell by sample, and is merely exercising that privilege. It seems to us this is the only construction that can be given to these revenue laws, unless we mean by a sort of judicial legislation to change the whole policy of the legislature for the last thirty years with respect to the licensed business of the State. We are therefore of opinion the defendant was properly convicted under the 45th section, and the county court did not err in so holding.

It has been further insisted that the machines sold by the defendant as agent of the Singer Manufacturing Company were manufactured by the company as assignees under a patent of the United States, and that no State can consistently with the Federal Constitution and the laws of the United States impose burdens by taxation or otherwise upon the

privilege of selling such machines within its limits. When we consider the number and variety of patented articles sold throughout the country by the patentees or their assigns, it is obvious that if the proposition contended for be correct the States will be deprived of an immense amount of revenue for the support of their governments and the conduct and management of their domestic economy and administration. The learned counsel produced no authority in support of this doctrine. The only decision cited having any bearing on the subject is that of the Supreme Court of the United States in Patterson vs. State of Kentucky, reported in Albany Law Journal, February 22, 1879, page 156. The only question in that case was whether a State may provide for the inspection of illuminating oil patented by the government, and may prohibit the sale of any that will not stand the prescribed test. It was held that the prohibition was a police regulation within the power of the State. That case, therefore, did not call for any decision of the precise point involved here. But Mr. Justice Holland, who delivered the opinion of the court, drew a very just distinction between the right of property in the physical substance, which is the fruit of a discovery or invention, and a right in the discovery or invention itself. The right to sell the oil itself is not derived from the patent, but exists independent of it. The right which the patent primarily secures is the exclusive right in the discovery or invention, which is an incorporeal right. The enjoyment of that right may be secured and protected by the Federal Government against all hostile State legislation, but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of State legislation simply because the inventor acquires a monopoly in the discovery. Applying these principles to the present case, the patentee has the exclusive right to use or sell the "Singer sewing machines." No one has the right to use the product of his labors except with his consent. He has a monopoly in the invention, and this is the sole operation and effect of the patent. But this does not prevent the States in the exercise of their just powers of taxation from taxing the business of selling the machine which is the subject of the invention. If the State attempts by a system of hostile and discriminating legislation to destroy the entire value or use of the discovery or invention, a very different question would then be presented. But so long as the taxation imposed is just and reasonable, and accords with the general burdens imposed upon like subjects of taxation, there will be no just grounds of complaint. As was said by Chancellor Kent, in Livingston vs. Van Ingen, 9 Johnson Rep., 582, that species of property must likewise be subject to taxation and to the payment of debts as other personal property. The national power will be fully satisfied if the property created by patent be for the given time enjoyed and used exclusively, so far as under the policy of the several States the property shall be deemed fit for toleration and use. There is no need of giving this power any broader construction in order to attain the end for which it was granted—which was to reward the beneficent efforts of genius and to encourage the useful arts.

Under the Virginia statutes it is not pretended there is any discrimination against patentees residing in this or other States, or against their assignees. The tax is imposed equally upon the sale of all articles or machines manufactured in this or other States and Territories, whether patented or not, and no complaint is made that the tax is burdensome or oppressive. It was said by the Attorney-General in the argument here that the patent granted to the inventor of the "Singer sewing machine" had expired, and had not been renewed by Congress. If this be

so, there can be no pretence or claim of right in the present company to the exclusive use or sale of the machines, or to an exemption from taxation by the State. And, lastly, it is claimed that the statute under which the defendant was convicted is in conflict with the power vested in Congress to regulate commerce among the several States, and is therefore unconstitutional and void. The learned counsel for the defendant laid no particular stress upon this point, and clearly attached no great importance to it. The Singer Manufacturing Company, as far as appears, paid the tax imposed on residing merchants without objection or protest, and was only licensed as such. Under this license it claims the right to sell its machines in any part of the State, and this whole controversy grows out of the assertion of that right. Upon the trial in the county court its claim for exemption was based upon two grounds—first, that the company, having taken out a merchant's license, had the right under it to sell by its agents in the county of Henrico or elsewhere; and, secondly, that as an assignor of the patentee it could sell independently of any restrictions or limitations imposed by the laws of the State. It does not appear that any question was raised as to the constitutionality of the tax in other respects, or that the pleadings or evidence were framed with reference to the point now presented in the argument. That point seems to have been an afterthought—first raised in the circuit court, and now renewed in this court. Without entering into any detailed argument on the subject, we think there is no just ground for saying that any discrimination is made by the statutes of this State against the products or citizens of other States. As was said by the Supreme Court of the United States in Wordruff vs. Parham, 8 Wallace, 140, there is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the law is not, therefore, an attempt to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity possessed by resident citizens. For whether the goods be manufactured here or manufactured abroad, their sale without a license is equally prohibited, and the same tax is to be paid in each case for the privilege of selling. It is very true that the 46th section contains an exception in favor of resident manufacturers. But this exception is not founded upon any idea of discriminating against non-resident manufacturers, but upon the policy of holding out inducements to the investment of capital and the employment of labor in that branch of business. When we consider the practice, energy, and skill, so necessary in all the various processes required for the production of manufactured articles, the great outlay of capital and labor necessary, the accessions they bring to the wealth and power of a community, and the taxes imposed upon the property employed in that branch of business, it is not at all surprising that many of the States have allowed exemptions from taxation upon the article whilst it is in the hands of the manufacturer. It might with as much propriety be contended that exemptions in favor of literary and benevolent associations constitute unjust discriminations against non-residents. If the resident manufacturer pays no tax upon the sale of his fabric, he pays more than an equivalent in the burdens imposed upon the property, real and personal, often employed in the business. This exception is nothing new in Virginia. It has prevailed here for nearly forty years without being called in question. No decision of the Supreme Court of the United States or of any court has been cited which holds that such an exemption is an unconstitutional discrimination against non-residents. Most of the cases are cited in Howe Machine Company vs. Gage, re-

cently decided by the Supreme Court of the United States and not yet reported. But none of them invoke the precise question arising here. This court has, therefore, no sort of difficulty in sustaining a system of legislation sanctioned by time, the usage of States, and the principles of equity and justice.

I, Joseph W. Caldwell, clerk at Wytheville of the supreme court of appeals of Virginia, do hereby certify that the foregoing, including the printed pamphlet attached, is a complete transcript of the record of Webber vs. Commonwealth, lately pending & determined in said court, as the said record therein remains, & I further certify that as clerk of said court I have never been furnished with a seal.

Given under my hand this 1 Dec., 1880.

Teste:

JOS. W. CALDWELL, *C. C.*

Fee for transcript, $19.15.

JOS. W. CALDWELL.

(Indorsed:) Webber v. Commonwealth. Transcript.

6 From the circuit court of Henrico County.

WEBBER
v.
COMMONWEALTH. } D. M. 43 L.

7 In the supreme court of appeals of Virginia.

RICHMOND:

WEBBER
v.
COMMONWEALTH.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner, J. T. Webber, hereby respectfully represents to your honors that he is aggrieved by a judgment of the circuit court of Henrico County, rendered on the 28th day of June, 1880, affirming a judgment of the Henrico County court, rendered on the day of May, 1880, in a prosecution then therein pending; and which said judgment was appealed from to the said circuit court.

A duly authenticated transcript of the record of said prosecution and appeal, so far as the same pertains to this petition, and to the subject-matter thereof, is herewith exhibited.

The petition for appeal from the county court to the circuit court alleges three grounds of error in the judgment of the county court. The circuit court, after considering each and all of said grounds of error, decided that the judgment of the county court was right. But your petitioner still believes, and so insists, that upon each of said grounds the judgment of the county court is erroneous; and hence also here in sists that upon each of the said alleged grounds the judgment of the circuit court is erroneous. The reasons for your petitioner's belief are set forth in the said petition to the circuit court, which is a part of the record herewith presented. The facts of the case are also therein set
8 forth. As it would be useless to repeat the facts or the said reasons here, your petitioner asks that the said petition may be taken and treated as forming a part of this one.

The three grounds of error are as follows:

1st. Because the Singer Manufacturing Company were properly licensed, as resident merchants, and were owners of the the machines sold by your petitioner, and therefore it was not necessary that your petitioner should take out a license as an agent for the sale of articles manufactured outside of the State.

2d. Because the machines sold by your petitioner, as employee of said company, were machines manufactured by said company, as assignee, under a patent of the United States; and no State has any right to impose any burden whatsoever upon a patentee or assignee of a patent for the privilege of selling articles manufactured by him under said patent.

3d. Because the statute under which your petitioner was presented is unconstitutional, being in derogation of the Constitution of the United States, in that it is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States.

The second and third grounds will not be argued here, but your petitioner relies upon the authorities set forth in the petition to the circuit court.

As to the first ground of error, your petitioner submits the following additional reasons why the judgment of the lower court should be reversed:

Your petitioner was indicted under the 45th section of the revenue laws of 1878. As much of that section as it is necessary here to quote reads as follows: "Any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or take orders therefor on commission, or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or Territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles through the agency of another," &c., &c.

In construing this section in the light of this case, the first inquiry that suggests itself is whether your petitioner, as agent or employee of the Singer Manufacturing Company, had the right to sell the machines of the company, without the license specified in said section, even if it be admitted that the company had the right so to sell.

Your petitioner insists that his right to sell is decided by Myerdock's case, 26 Grat., 990. In that case the court said, "The plaintiff in error was their agent, and was selling by sample for their benefit, and not for his own. When the statute declares that such license 'shall be a personal privilege,' it does not mean that the party obtaining such license shall be required to sell in person, and not by another; it only means
to declare that such license shall be used for the benefit of the
9 party to whom it is issued. He cannot transfer it to another, nor can any other person sell under it; but certainly there is no inhibition on the statute against sample merchants operating through agents. A sale by an agent is a sale by himself." In that case the court was construing the sample merchants' law—a law that bears upon its face the declaration that the license granted under it is a "personal privilege." In this case no such language has to be construed. It follows, then, that if the company had the right to sell its machines, the accused, as the agent or employee, had equally the same privilege. This being true, the argument hereafter will assume that the agent was the owner of the machines, and taxed as a merchant. This assumption can have no effect, except to shorten the argument. With this single assump-

tion, we shall attempt to show that we were improperly convicted under the said 45th section. It was contended in argument in the circuit court that in going around the country and selling as we do we are not acting under our licence—that our license confines us to our place of business; and not only was it thus argued, but the circuit court upon this ground overruled our first assignment of error, and held that we were properly convicted for so acting. Admit for the present that our license does not authorize us to go around and sell as we do; yet we ask under what section are we to be punished? Not under the sample merchants' section, because we were not presented under it. A most cogent reason in law. Nor can we be punished under the pedlars' section for the same sufficient reason. And it will not be denied that if we are to be punished in this case, we must be punished under the 45th section, the one under which we were presented. We have quoted that section as fully as it is necessary for this case. From a second reading of that section it will surely be noticed that not one word is said in it about the manner in which the articles may be sold. This section was not intended to prescribe a punishment for any person's travelling about and selling, instead of selling at their place of business. Its object was not to specify the manner in which anything might be sold. Its sole and single object was to prevent any one from selling (no matter how sold) the manufactured articles of another State, "unless he be the owner thereof and taxed as a merchant." Its object then was to punish all persons for selling these articles without the specific license, except two classes of individuals. Without specifying the manner in which these classes are to sell, it distinctly and expressly announces that they may sell without taking out the license required by the said 45th section.

If this be true—and there can be no doubt on the subject—we ask how can we be punished under a section that says we may sell without the license, and does not put any limitation whatever upon the manner in which we may sell. It must be, then, that the section was not intended to provide a punishment for us. We are expressly excepted from its purview. And yet, while this section declares upon its very face that it has no application to us, we have been presented and convicted under it.

It may be that we can be properly indicted under some other section, but that as a fact would not authorize a conviction under the 45th section. It may be that we are selling as pedlars without the proper license—and such is the offence of which the circuit court regarded us as guilty. Yet we again insist that to be convicted and punished because of that offence we must have been indicted for that offence. Your petitioner, therefore, respectfully submits that he cannot be rightfully convicted under the 45th section, however guilty he may be of other offences against the revenue laws of Virginia. But he further insists that at the proper time he can show that he has not been guilty of any offence.

It may be well to view this section in another light, viz, to enquire what has to be proved in order to convict one under it. It is obvious that there are four necessary allegata and probata.

1st. That the party had been selling in Virginia.

2nd. That the articles he had been selling were articles manufactured in another State or Territory.

3rd. That the party selling such articles had been selling them without having the license required by this section.

4th. That the party so selling such articles without the proper license was not the owner thereof, and was not taxed as a merchant, &c., &c.

It cannot be denied that a conviction would be improper, unless all four of these essentials had been proved. Each and all of them are material allegations. Each and all of them are in substance alleged in the indictment, and each and all of them must therefore be proved in order for the State to have a conviction. A failure to prove any one of these allegations is no less than a failure to establish the offence itself. For these allegations are not only parts of the offence, but each one of them is an essential ingredient of it. The absence of any one of them dissipates the illusion of the crime.

Surely no argument is needed to prove that the fourth allegation is as important as any of the rest. It is a special saving to show that certain parties shall not be punished for selling the articles referred to. It is in truth a command of the law that these certain persons shall be allowed to sell these articles without the required license. As soon, then, as an accused proves himself to be one of these privileged persons, the shield of the law itself is advanced to protect him from her own officers.

Let these truths be applied to this case.

Has there been a failure to prove any one of the four essentials? A remembrance of the facts agreed will show that there has been just such a failure. The record shows that the first three allegations were fully proved. But the record also shows that not only was the fourth
11 one not proved, but that it was fully disproved. For it was an admitted fact that the Singer Manufacturing Company was the owner of the machines, and was taxed as a merchant. The failure, then, to prove this fourth ingredient of the offence disproved the offence, and your petitioner should have been acquitted.

For these, and other errors appearing upon the face of the transcript of the record, your petitioner prays that a writ of error and supersedeas may be allowed to the said judgment of the said circuit court, and that the same may be reviewed and reversed by this court.

J. T. WEBBER. *by counsel.*
MEREDITH & COCKE.
KEAN & DAVIS.

The undersigned, attorneys practicing in the supreme court of appeals, are respectfully of the opinion that the judgment of the circuit court is erroneous, and that the same ought to be reviewed and reversed.

MEREDITH & COCKE.
KEAN & DAVIS.

Writ of error and supersedeas awarded. Bond required in the penalty of $100.00, with condition as the law directs.

JOS. CHRISTIAN.

JULY 6, 1880.

To the clerk of the supreme court of appeals at Richmond.

VIRGINIA:

Pleas at the court-house of the county of Henrico, before the judge of the circuit court of the said county, on Monday, the 28th day of June, one thousand eight hundred and eight.

Be it remembered, that at *at* this same term, to wit:

At a circuit court continued by adjournment, and held for the said county of Henrico, at the court-house, on Tuesday, the 1st day of June,

in the year 1880, came J. T. Webber, and presented to the court, by his attorneys, his petition, which is in the following words and figures:

To the honorable B. R. Wellford, judge of the circuit court of the county of Henrico:

12 Your petitioner, J. T. Webber, hereby respectfully represents to your honor that he is aggrieved by a judgment of the county court of Henrico County, rendered on the day of May, 1880, in a prosecution then therein pending.

A duly authenticated transcript of the record of said prosecution, so far as the same pertains to this petition, and to the subject-matter thereof, is herewith exhibited, by which will appear the following facts:

That on the 12th day of May, 1880, the grand jury of Henrico County court found a presentment against your petitioner for selling, without a proper license, certain sewing-machines, being articles manufactured beyond the limits of Virginia.

That your petitioner plead not guilty.

That your petitioner did sell sewing-machines in the county of Henrico, without having the license required for the agents selling articles manufactured beyond the limits of Virginia.

That the sewing-machines he offered for sale were manufactured without the State.

That when selling said machines he was the employee of the Singer Manufacturing Company, and acting under their orders.

That the machines he sold were machines belonging to the said company, and made by said company, under the right granted them by a patent of the United States.

That the Singer Manufacturing Company are resident merchants of Richmond, Va.

That the said company were licensed as such at the time of the said sales made by your petitioner.

The above were the facts agreed in the case. After they were given to the jury, your petitioner asked the court to instruct the jury as set forth in the 2d bill of exceptions.

The court refused to grant the said instructions asked for, but granted the instructions asked for by the commonwealth as set forth in 3 bill of exceptions.

After the instruction was given as aforesaid, the jury found your petitioner guilty.

Thereupon the court entered the fine against your petitioner, as shown by the accompanying record.

Your petitioner then moved for a new trial; which motion the court overruled, and your petitioner appeals to your honor.

Your petitioner believes, and so insists, that the said county court erred in granting the instructions it gave in refusing to give the instructions asked for by your petitioner and in refusing your petitioner a new trial.

1st. Because, as your petitioner was only an employee of the Singer Manufacturing Co., and as the said company were properly licensed, as resident merchants, and were the owners of the machine sold

13 by your petitioner, it was not necessary that your petitioner should take out a license as an agent for sale of articles manufactured outside of the State.

2d. Because the machines sold by your petitioner, as employee of said company, were machines manufactured by said company, as assignees, under a patent of the United States; and no State has any right

to impose any burden whatsoever upon a patentee or assignee of a patent for the privilege of selling articles manufactured under a patent by a patentee or assignee of a patent.

3d. Because the statute under your petitioner was presented as aforesaid is unconstitutional, being in derogation of the Constitution of the United States, in that it is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States.

Your petitioner was presented as aforesaid under the 45th sect., p. 66, of the revenue laws of Virginia of 1878; and he insists that a simple reading of that section will satisfy your honor that his first position, above set forth, is correct, and that he ought not to have been presented and found guilty.

That section distinctly and specifically excepts from its scope and purport parties who are owners of articles sold and who are taxed as merchants.

The facts show that the said company were the owners of the machine sold, and that they were taxed as merchants. It therefore follows that your petitioner, as an employee of said company, had a right to sell said machines without taking out a license under said 45th section, for no one will contend that a merchant cannot sell by his clerks or employees.

In support of your petitioner's second position, he refers your honor to the following cases: 70 Ill., 109; 43 Ind., 167; 53 Ind., 454; 4 Wheat, 432.

In support of his third position your petitioner refers your honor to an opinion of the Supreme Court of the United States in a case similar in all respects to this. See 10 Otto, p. 275.

For these and other errors appearing upon the face of the transcript of the record your petitioner prays that a writ of error and supersedeas may be allowed to the said judgment of the said county court, and that the same may be reviewed and reversed by this court.

J. T. WEBBER, *by counsel*,
MEREDITH & COCKE,
KEAN & DAVIS.

The following is the transcript of the record of the judgment of the county court of Henrico, referred to in the foregoing petition, and which accompanied the same, to wit:

14 VIRGINIA:

Please at the court-house of the county of Henrico, before the judge of the county court of said county, on Tuesday, the 18th day of May, one thousand eight hundred and eighty.

Be it remembered, that at this same term, to wit:

At a court began and held for the county of Henrico, at the court-house, on Monday, the 10th day of May, 1880.

James M. Carter, gentleman, foreman, Ro. A. Henley, Smith A. Thorpe, A. J. Ford, Frederick Frommer, William H. Brauer, M. F. Allen, C. Archer, and J. F. Childrey, were sworn a grand jury of inquest for the body of this county, having been summoned under an order of this court, entered at the last term, and having received their charge, withdrew, and after some time returned, and presented sundry bills of indictments, and not having completed their enquiries were adjourned until Wednesday morning next, the 12th inst., at 11 o'cl'k.

At which day, to wit:

At the same court, continued by adjournment, and held for the county of Henrico, at the court-house, on Wednesday, the 12th day of May, in the year 1880.

The grand jury, approved, according to their adjournment, on Monday last, and were sent out of court, and after some time returned, and among others made the following presentment:

VIRGINIA.

In the county court of Henrico, Henrico County, to wit:

The grand jurors of the commonwealth of Virginia, in and for the body of the county of Henrico, duly summoned to and were attending said court, do upon their oaths present J. T. Webber, for this, that he, the said J. T. Webber, within one year last past, in the said county, and within the jurisdiction of this court, upon divers days and times within the year aforesaid, then and there did unlawfully sell and offer to sell, certain machines known as the "Singer Sewing Machine," the said machines not being manufactured within the limits of the commonwealth of Virginia, but in another State, to wit, the State of New York, without in any manner having first obtained a license from the proper authorities of the said county authorizing him to sell or offer to sell, the said machines therein, and without in any manner having first paid the tax imposed by law for the privilege of so doing, he, the said J. T. Webber not being a merchant, or an agent selling on commission for any person or persons, firm or firms, authorized by law to sell or offer for sale the machines aforesaid, in the county aforesaid, he, the said J. T. Webber, not being the owner of the machines offered by him for sale as aforesaid, against the peace and dignity of the commonwealth of Virginia.

This presentment is made upon the testimony of A. J. Potter and L. H. Herbert, witnesses, called on by the court, sworn in court, and sent to the grand jury to give evidence.

JAMES M. CARTER,
Foreman.

And, at another day, to wit:

At the same court continued by adjournment, and held for the said county of Henrico, at the court-house, on Saturday, the 15th day of May, in the year 1880.

This day came the attorney for the commonwealth, and the defendant, J. T. Webber, appeared in his own proper person, and by his attorneys.

And thereupon the said defendant, for plea, saith he is not guilty in manner and form, as in the presentment against him is alleged.

Whereupon came a jury, to wit, R. B. Allen, George M. Walsh, John A. Harper, J. W. Blankenship, Ro. A. Roper, Christian Sears, E. T. Bradley, Abram Starke, Jno. S. Alvis, R. T. Crouch, J. G. Blakey, and T. J. Tiller, who were elected, tried, and sworn the truth to speak upon the issue joined, and having heard the evidence, were, with the consent of the attorney for the commonwealth, and the said defendant, adjourned until Tuesday morning next, the 18th inst., at 10 o'cl'k.

And thereupon the said J. T. Webber here in court acknowledged himself indebted to the Commonwealth of Virginia in the sum of three hundred dollars, of his goods and chattels, lands and tenements, to be levied, and to the use of the commonwealth rendered.

Yet upon condition, if the said J. T. Webber shall personally appear before this court on Tuesday morning next, the 18th inst., at 10 o'clock,

to answer the commonwealth of and concerning the misdemeanor whereof he stands presented, and shall not depart thence without the leave of the court, then this recognizance is to be void, else to remain in full force and virtue.

And now, at this day, to wit:

At the same court continued by adjournment, and held for the
16 county of Henrico, at the court-house, on the day and year first herein written, to wit, on Tuesday, the 18th day of May, in the year 1880.

This day came again the attorney for the commonwealth, and the defendant appeared in court in discharge of his recognizance entered into on Saturday last.

And the jury sworn in this cause appeared in court according to their adjournment on Saturday last, and having retired to consult of their verdict, after some time returned, and upon their oaths do say that the accused is guilty in manner and form, as in the presentment against him is alleged.

And thereupon the said defendant moved the court to set aside said verdict of the jury, and grant him a new trial, upon the ground that the said verdict is contrary to law and the evidence, and the said motion being argued was overruled by the court.

Therefore it is considered by the court that the said J. T. Webber for the offence charged in the presentment, and of which he has been found guilty by the jury, be fined for the commonwealth the sum of fifty dollars, and that the said commonwealth recover against him the said amount, and also recover against him the costs of this prosecution.

And the said defendant intimating his intention of applying to the circuit court of the county of Henrico for a writ of error and supersedeas to the judgment aforesaid, execution thereof is suspended for the period of sixty days, in order to allow him to make such application.

MEMORANDUM.—To the opinion of the court, overruling his motion to set aside the verdict of the jury rendered in this case, and grant him a new trial; and to sundry opinions of the court given against him during the progress of the trial of the case, the defendant excepted and tendered his bills of exceptions, numbered one, two and three, which are signed and sealed by the court, and ordered to be made a part of the record of this case.

BILLS OF EXCEPTIONS.

No. 1.—Be it remembered that after the jury had rendered their verdict in this case the defendant moved the court to set aside the said verdict and grant him a new trial, on the ground that said verdict is contrary to the law and evidence, which motion was overruled by the court, and the defendant excepted, and prays the court to sign and seal this bill of exceptions, which is accordingly done. And on the motion of the defendant the court doth certify the following to be all the facts proved in the trial:

That the Singer Manufacturing Company, a corporation duly incorporated under the laws of the State of New Jersey, has a place of
17 business, being a store in the city of Richmond, Va., wherein it keeps a stock of sewing machines and the appendages thereto necessary and proper.

That they have occupied their present place of business for the last

five or six years, during which time they have been selling their sewing machines at said store; that they are duly licensed by the State of Virginia for the year beginning May 1, 1880, and ending May 1, 1881, as resident merchants; that for the said license they paid the sum of $322.00; that the prisoner was at the time he offered to sell and did sell and deliver at the time of sale, to wit, since May 1, 1880, machines to divers citizens of Henrico County, Virginia, in the said county of Henrico, who were not merchants, tradesmen, &c., are employed of said company, and was ordered by them to attempt, and did so attempt, to sell them.

That the machines so offered for sale were machines made by the company in accordance with specifications of a patent granted April 22, 1879, by the United States of America to me, Wm. C. Hicks, and assigned to the Singer Manufacturing Company prior to the acts done by the prisoner; that at the time the machines were offered for sale they were the property of the company; that said company is a resident merchant of this State, and taxed as such, as appears from the license granted to said company, which is in the words and figures following, to wit:

The collector of State license tax, city of Richmond, will receive of the Singer Manufacturing Company, Edward Clark, president, three hundred and twenty-two dollars, assessed by me as commissioner of the revenue for the city of Richmond, which sum is the tax imposed by law on resident merchants, purchases $90,000.00. No. 821 East Main street, in the said city, until the first day of May, 1881.

Given under my hand this 1st day of May, 1880.

R. B. MUMFORD.

Commissioner's fee, 75 c.

Commissioner of the revenue, city of Richmond.

Received of the Singer Manufacturing Co. three hundred and twenty-two dollars, the above tax assessed by the commissioner of the revenue of the city of Richmond.

Given under my hand this 1st day of May, 1880.

$321: coupons, $1.75 cash.

R. H. SMITH,
Ass't Collector State Licenses, City of Richmond.

And that such machines were manufactured beyond the limits of the commonwealth.

It is further agreed that the accused had taken out no license to sell said machines in the county of Henrico, Va.; nor was he him-
18 self the owner of said machines otherwise than as the employee or agent of said company; nor was he himself taxed as a merchant; nor was he a person taking orders on commission for such sales or otherwise.

EDMUND WADDILL, JR. [SEAL.]

No. 2. Be it remembered that, after the evidence mentioned in the first bill of exceptions, which is hereby made a part of this bill, had been given to the jury, the accused asked the court to instruct the jury as follows:

The court instructs the jury that, if they believe from the evidence that the Singer Manufacturing Company paid to the proper officer of the State the sum of three hundred and twenty-two dollars for a general

merchants' license for year beginning May 1, 1880, and ending the 1st May, 1881, and received from said officer such license; and, further, that when the prisoner offered to sell the machines known as the Singer sewing machines, he was only acting as the employee of the said Singer Manufacturing Company, then they must find the prisoner not guilty.

The court further instructs the jury that if they believe, from the evidence, that the Singer Manufacturing Company are the patentees in the patent offered in evidence; that the sewing machines offered for sale by the prisoner were machines made by said Singer Manufacturing Company in accordance with specifications in said patent; that at the time they were so offered for sale they were the property of the said Singer Manufacturing Company, and that the said prisoner, when so offering them for sale, was acting only as the employee of said company, then they must find the prisoner not guilty.

But the court, after considering the same, refused to grant said instructions, to which ruling of the court so refusing the accused excepted and tendered this, his bill of exceptions to the said refusal of the court, which he prays may be signed, sealed, and made a part of the record; which is accordingly done.

EDMUND WADDILL, JR. [SEAL.]

No. 3. Be it remembered that, after the evidence mentioned in the first bill of exceptions, which is hereby made a part of this bill, had been given to the jury, the commonwealth asked the court to instruct the jury as follows:

If the jury shall believe, from the evidence, that the accused upon divers days and times within one year last past, prior to this presentment, and down to the time of making the same, did carry from the city of Richmond into different parts of the county of Henrico divers sewing machines manufactured beyond the limits of the Commonwealth of Virginia, known as "The Singer sewing machine," and did sell and offer to sell to divers persons living and residing in said
19 county the said machines, and did then and there, upon the sale of the said machines, deliver the same to the purchaser or purchasers thereof; and that at the time of the sale and delivery of the machines aforesaid, to the persons aforesaid, that the accused was neither the manufacturer nor owner of the said machines, and was not taxed as a merchant in said county, nor took orders therefor on commission or otherwise, and had not at the time of such sale and delivery obtained from a commissioner of said county a license to sell the same or offer the same for sale in the county aforesaid, and had not paid to the proper officer of said county the tax imposed by law for selling the same in said county; then they should find the accused guilty.

And after considering the same, the court granted and gave the instruction as offered by the commonwealth, to which granting and giving said instruction the accused excepted, and tendered his his bill of exceptions to the said granting and giving of the instruction by the court, which he prays may be signed, sealed, and made a part of this record; which is accordingly done.

EDMUND WADDILL, JR. [SEAL.]

A true transcript of the record of the case of Commonwealth against J. T. Webber, lately depending in Henrico County court.

Teste:

SAMUEL P. WADDILL,
Clk Henrico Co. Ct.

And thereupon a writ of error was awarded the said J. T. Weber to a judgment of the county court of Henrico County pronounced against him on the 18th day of May, 1880, upon a presentment for a misdemeanor, whereby it was considered that the said J. T. Weber, for the offense charged in the presentment and of which he has been found guilty by the jury, be fined for the use of the commonwealth the sum of fifty dollars, and that the said commonwealth recover against him the said amount, and also recover against him the costs of said prosecution, which writ is to be returnable here on the 7th day of this month. But the petitioner is not to have the benefit of the said writ nor shall the same be effectual until he, or some one for him, shall execute a bond in the penalty of one hundred dollars, conditioned according to law.

And the said writ is in the following words and figures:

The commonwealth of Virginia to the sheriff of Henrico County, greeting:

20 Whereas in the record and proceedings, and also in pronouncing a judgment by the county court of Henrico on the 18th day of May, 1880, in a prosecution by the commonwealth against J. T. Webber, for a misdemeanor whereby it was considered that the said J. T. Webber, for the offence charged in the presentment and of which he has been found guilty by the jury, be fined for the use of the commonwealth the sum of fifty dollars, and that the commonwealth recover against him the said amount, and also recover against him the costs of the prosecution, manifest error intervened, as it is said, to the damage of the said J. T. Webber, as by his petition we are informed. And whereas the said J. T. Webber, upon his petition to our circuit court of the county of Henrico obtained a writ of error to the said judgment:

Whereupon, we being willing that the error aforesaid, if any, be corrected, and speedy justice done to the parties, command you that you make known to the attorney prosecuting for the commonwealth in the county court of Henrico County, that he be before the judge of the circuit court of the county of Henrico, at the court-house, on the 7th day of the month, (June, 1880,) when and where our said circuit court, the said record proceedings and judgment being inspected, will further do for correcting the error aforesaid what of right and according to law ought to be done. And have then there this writ.

Witness Geo. W. Carter, clerk of our said circuit court, at the court-house, this 3d day of June, 1880, and in the 104th year of the commonwealth.

SAMUEL P. WADDILL, *D. C.*

(Endorsed:)

Bond has been executed as required in penalty of one hundred dollars.

SAMUEL P. WADDILL, *D. C.*

I accept legal service of the within writ.

GEO. W. THOMAS,

Commonwealth's Attorney of Henrico County.

And now at this day, to wit:

At a circuit court continued by adjournment and held for the county of Henrico, at the court-house, on the day and year first herein written, to wit, on Monday, the 28th day of June, in the year 1880.

21 This day came as well the plaintiff in error, by his attorneys, as the attorney-general of Virginia, and the matters of law arising upon the petition for the said writ of error, and on the transcript

of the record of the judgment aforesaid and the proceedings therein, were fully argued by the counsel for the said plaintiff in error and by the said attorney-general.

And the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, it seems to the court here for reasons stated in writing, filed and made a part of the record in this case, that there is no error in the said judgment of the county court of Henrico.

Therefore, it is considered that the same be affirmed, and that the defendant in error, the Commonwealth of Virginia, recover against the said plaintiff in error for costs by her about her defence in this behalf expended.

And the attorneys for the said plaintiff in error intimating their intention of applying to the supreme court of appeals of Virginia for a writ of error and supersedeas to the judgment aforesaid, execution thereof is suspended for the period of thirty days, in order that such application may be made, provided the said plaintiff in error, or some one for him, shall, within ten days, execute a bond before the clerk of this court, in the penalty of one hundred dollars, according to law.

The following is the opinion of the court referred to in the foregoing judgment:

Circuit court, co. of Henrico, Va.

WEBBER
vs.
COMMONWEALTH VIRGINIA.

The prosecution in this case is for a violation of the 45th section of the license law, p. 66.

(I quote throughout this opinion from the auditor's edition of the revenue laws, published 1878.)

The defendant complains that in his conviction, and the judgment of the court assessing against him a fine, he has suffered wrong.

The errors assigned involve three separate matters:

1st. The refusal of the court to grant the first instruction to the jury asked by the defendant.

The presentment charged that the defendant sold and offered to sell certain sewing machines manufactured outside of the commonwealth, and not his own property—he not being a merchant or agent for a principal, authorized to sell and offer to sell in the county of Henrico, without having previously obtained the license required by law.

The uncontroverted evidence established the fact that the def't did
22 offer to sell, and actually sell and contemporaneously deliver such articles as were described in the presentment; that he was not a merchant, but was acting in such offer to sell and sale as the agent of the Singer Man'g Co., a corporation duly incorporated by the laws of N. J., and recognized by the revenue officers of Virginia, as a resident merchant of the city of Richmond, and authorized to do business in this State as such, for which privilege this corporation had paid a license tax of more than $300.00.

The instruction assumed that this authority involved the right of the def't under the orders of his principal to do the acts complained of within the county of Henrico without any further license tax.

I think this instruction was properly rejected.

The dealings of the def't might, as set out in the presentment, be re-

garded as the dealings of a sample merchant (sec. 34, p. 62), or as those of a pedlar (s. 36, p. 64).

The evidence, however, clearly shows that the def't did not deal, or offer to deal, as a sample merchant, but did deal as a pedlar.

The sample merchant does not sell by present delivery. The pedlar does.

This seems to me the great distinction between the two classes.

The sample merchant sells or offers to sell "by sample, card description, or other representation, verbal or otherwise," or by collecting orders by sample or description, but no language could better exclude the idea of sale, or offer to sell, on personal sight of the article sold, or delivery thereof, contemporaneously with sale (sec. 34, p. 62).

The pedlar carries his goods from place to place, solicits purchasers by exhibition, not description of the articles, and offers to sell or actually sells them with immediately contemporaneous delivery, or constructively immediate delivery of articles in actual transit to the purchaser (sec. 36, p. 64).

I am of opinion that under the last clause of the 35th sec., p. 63 of the license law, the general assembly intended to concede to every licensed merchant or manufacturer who had paid a license tax as such of $100 or more, the privilege, to be exercised, either by himself or any bona fide employee or agents, of a sample merchant without any further tax. It is to be observed, however, that this clause is carefully limited in its language to a qualification of the 34 & 35 sections of the license act.

No such privilege of exemption from the peddler's license is expressed in sec. 36 & 37. Upon the other hand, the only parties exempted in the 37th section are resident mechanics or manufacturers peddling their own manufactures made in the State. This exemption seems to me to have been conceded only in the interest of the humbler, industrial classes, who might be compelled to resort to personal visitation to effect sales of their handywork.

The language of the exemption does not seem to me to contemplate or authorize the exercise of this privilege by any substitute or agent, unless it be perhaps a member of the family or some unpaid sub-
23 stitute; and if this view be correct, it necessarily excludes corporations, which must always act by agents & individuals, manufacturing or merchandizing upon large capital.

I am of opinion, therefore, that the first assignment of error is not tenable.

2d. The second assignment of error is the rejection by the court of another instruction asked by the def't.

This instruction assumes that the Singer Man'g Co., being the owners of a patent granted by the U. S., and having manufactured the sewing machines sold by the def't as their employee, in accordance with the specifications in their patent, were authorized, under their right as patentees, acquired from the U. S., to sell through their agents without the payment of any license tax to the State.

I do not think that this claim can be maintained.

If the patent laws of the U. S. had assumed to confer any such privilege, I think such assumption would have exceeded the constitutional powers of Congress. The grant of power in the Constitution, art. 1, sec. 8, is simply this: "To promote the progress of science and useful arts by securing for limited time, to authors and inventors, the exclusive right to their respective writings and discoveries."

Under this grant of power, it was clearly the right and the duty of

Congress, if it were ever exercised, to prescribe how the claim of invention or authorship should be established, & that being established, the mode and manner in which the fact was to be adjudicated beyond controversy.

The length of time within which the inventor or author was to enjoy a monopoly, and during that length of time to declare his absolute right of property in the privilege of using or vending the writing or discovery, and to enact all legislation to provide prompt and efficient remedies, through the Federal courts, which might be necessary to protect the author or patentee in the enjoyment of his monopoly as property.

I do not understand that it has been imputed to Congress that its legislation has gone beyond these limits.

It has not ever been deemed necessary or proper to invest the Federal courts with any farther jurisdiction than such as was requisite to determine controversies involving disputes as to the force and validity of the patent and the right of the patentee to the monopoly which it gives him.

In the very last volume of Reports of Supreme Court of U. S., a case is reported in which that court refused to entertain jurisdiction of a controversy between citizens of the same State, dependent upon the determination of the relative rights of a patentee & his assignee under a contract of assignment. (Hartell v. Tilghman, 9 Otto, 547.)

The U. S. is to-day a large landed proprietor in many of the
24 States, and is day by day passing title to thousands of purchasers.

In all of the new States the landholder traces back his title, in most cases not going beyond a living guarantee to the U. S., and has a right to claim, either mediately or immediately from the government, "the exclusive right," not for a limited time, but for all time, to the land granted.

It has never been claimed, however, that the obligation of the U. S. to secure him this exclusive right, or its patent professing to convey it, was comprehensive enough to exclude the authority of the State to assess the patentee, or his assignee, with any necessary taxation called for by the necessities of the State.

The claim asserted in behalf of the Singer Man'g Co. in the instruction asked by the def't cannot, it seems to me, stand upon any higher footing than that of a purchaser of a land patent. I am aware that it has been made, however, & sometimes with partial success in the courts of some of the States, or some of the subordinate Federal courts. I think, however, that a late decision of the U. S. Supreme Court, not yet reported in the regular series of reports, authoritatively determines that it cannot be conceded. I refer to the case of Patterson vs. Kentucky, decided Feb., '79, a report of which I find in 19 Alb. L. J., p. 156.

This case was one in which the manufacturer of a patented oil, which, under the laws of Kentucky, was classed as dangerous, claimed the right to sell under his patent in despite of the State law. The determination of the controversy involved simply an affirmance of the right of the State under her police power to impose restrictions upon the sale of any dangerous articles, but the reasoning and the dicta of the court are, I think, abundantly sufficient to show that that tribunal would not entertain the claim asserted by the defendant in the instruction now under consideration.

The third assignment of error involves the action of the court in granting the instruction asked by the Com'th in refusing the def't's mo-

tion to set aside the verdict, and in imposing upon the def't the penalty of a fine of $50.

Each of these acts of the court involved an enforcement of the statute as set out in the 45th sec. p., 66. It is insisted that this statute was invalid because of its conflict with the paramount law of the Constitution of the U. S. In examining this question we have to recognize as established by the decisions of the Supreme Court of the U. S., and not now open for controversy, two or three propositions.

1st. Any State law imposing a heavier tax upon the manufacturers or production of another State than it imposes upon its own is invalid because it conflicts with the exclusive power of Congress to regulate commerce between the States, under 3d cl., 8th sec., art. 1, U. S. Con. (Ward vs. Maryland, 12 Wall., 478; State freight tax, 15 Wall., 232, &c., &c.)

2. That a tax for license to sell goods is in effect to a certain extent at least a tax on the goods authorized to be sold, and that the heavier tax cannot be imposed under the disguise of a license tax to any greater extent than by direct assessment upon the goods.

This proposition is established in the great leading case of Brown vs. Maryland, 12 Wheaton, 419, and recognized and approved and emphasized in every case since, down to the latest unreported case of Howe Machine Co. vs. Gage, decided at the last term of the Supreme Court.

But on the other hand another proposition is equally well established.

3d. "Where a State imposes the same rate of taxation upon like articles whether brought from another State or the products of the State imposing the tax, the tax may be enforced."

I quote from the last decision just referred to *kotidom verbis*, as Swayne, J., spoke for the court. And in this opinion the previous judgment of the court, in Henson vs. Lott, 8 Wall., 148, is approvingly cited, in which it was said that if the tax upon the productions of the home State were levied by way of license, and that upon the productions of other States by direct assessment, that the difference in mode of collection did not affect the validity of the State legislation.

In the light of these propositions we have to examine the legislation of Virginia under which this prosecution is made.

The two sections, 45 & 46, p. 66 & 7, must be read as one whole. Section 45, excluding the exception, reads thus: "Any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, or takes orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or Territories, and shall not act as such without taking out a license therefor.'

Sec. 46 prescribes the tax for the license, and contains a provision which, without exceptional words to be hereafter considered, is in these words: "All persons selling articles manufactured in this State shall pay the specific license tax imposed by this section."

Reading these two sections together without the exceptions which I have omitted, there is no room for question that the statute is perfectly constitutional. Though the first section seems to discriminate against the products of other States, the second section removes the appearance of discrimination by requiring the same license from agents for sale of domestic manufactures."

Now let us look to the exceptions. In the first section the exceptions is on behalf of the owners of goods contributing to the revenue in another form as taxed merchants.

In the second section the exception is on behalf of resident manufac-

turers and their agents. These resident manufacturers contribute to the public revenue not merely directly in their own personal and
26 property tax, but indirectly in the taxation derived from the resident operators and agents employed in their manufactories.

The exceptions in both cases are apparently based upon the same wise and just principle of public policy and equal taxation.

In looking, then, to the language of the statute, it seems to me very clear to any impartial judgment that the purpose of the gen. as. was an honest purpose to impose a license tax upon a business or calling, and not upon the goods sold and employed as the basis of the business.

A vast amount of the capital of the country is invested in large corporate or individual manufactories. These manufactories must have some local habitation, where the capital invested and the army of employees gathered upon the spot contribute not only to the growth and wealth and prosperity of the community, but to the public fisc by taxation upon person and property.

The market for these manufactured goods, however, is under the beneficent provisions of our constitution, is as broad as the domains of the Union. The privilege of selling these articles within any defined extent of territory is of itself a valuable matter of property, and to make that privilege available requires the employment of agents, to each of whom it is a valuable and sometimes a very lucrative business.

These positions are eagerly sought by many of our own citizens in preference to other callings, for which they pay, without murmuring, onerous license taxes.

Unfortunately most of the manufactories are located outside of the State, and in describing the class of business contemplated, the phraseology used seems to justify the imputation of unfriendly legislation to our sister States.

It would have been strange indeed if, in the exigencies of the State, imposing the burthens of taxation upon all means of profitable employment open to our people in the walks of merchantile, mechanical, manufacturing, or professional life, this class of our citizens should have been overlooked; and if they be indeed under the constitutional powers of Congress a favored class, the oversight of their immunity would be charitably attributed to the gen. ass. as accidental, and not intentional.

It seems to me very clear then that this tax must be treated as a tax upon the business, and not upon the property upon which the business is based. Nevertheless, that tax being indirectly a tax upon the products of a sister State, it cannot be enforced, unless the same or an equivalent tax be imposed in the same or in another substantial form upon the products of Virginia.

The last clause of the 46th sec., p. 67, does impose the same tax in the same form upon the products of Virginia, with the sole exception, while those products are in first hands.

The question of the constitutionality of this tax, therefore, re-
27 solves itself into our examination of the right of the legislature to make the exception in the 46th sec. of "resident manufacturers or their agents." We may exclude the latter words, "their agents."

The ct. of appeals having decided in Myerdock's case (26 Grat., 988) that in the absence of language in the statute justifying the exclusion of the agent, the principal has the right to sue through him, and if the exemption of the manufacturer, by reason of residence, be constitutional,

I cannot see any room for controversy, because that emption was extended to his agents.

In this examination we cannot be embarrassed by any consideration of the effect of the first clause of sec. 2, art. 4 of Const., guaranteeing "to the citizens of each State all the privileges and immunities of citizens in the several States"; for this provision of the statute applies equally to the citizen of N. J. as to the citizen of Virginia, if resident, in its exemption, and no less equally in its burthen to either, if he be a non-resident. As to this matter the distinction is broadly defined and abundantly recognized in every decision, and by every constitutional lawyer. (Spear vs. Com'th, 23 Grat., 933; Cooley Const. Lim., 16, 586.)

None of the decisions of the Supreme Court, so far as I understand them, and certainly none of our own court of appeals, have ever denied to a State the right to make such an exception as this in behalf of its non-resident tax-payers, manufacturers.

As I have before stated, these manufacturers contribute abundantly in proportion to their capital to the revenue of the State, and the concession to them in consideration therefor of the right to vend their articles, to the best advantage, without paying a license tax required from their competitors, who can in no other way contribute to the revenue, is certainly no' unjust, even if it were on his constitutional discrimination in their favor.

The power of Congress is limited to commerce with foreign nations, among the States, and with the Indian tribes, and does not reach the internal State trade.

If the circumstances were similar between different municipalities of the same State, legislation like this of one municipality could not be assailed on the interest of another municipality or county in the same State, because of its conflict with constitutional functions of Congress.

If this were then an ordinance of the city of Richmond, and the claim of the def't be conceded, the result would be involved that the ordinance might be entirely valid against the manufacturers of our sister city of Manchester, while it would be invalid against the manufacturers of Baltimore, Philadelphia, and New York.

I cannot think that any such conclusion, by any ingenious distortion of the constitutional powers of Congress, nor by any fair interpretation of the decisions of the Supreme Court can be successfully asserted.

28 I am of opinion, therefore, that there is no error in the action of the court below, and that the judgment should be affirmed.

A true transcript of the record.

Teste:

GEORGE W. CARTER,
Clk Circuit Court of Henrico County.

Fee for this transcript, $8.75.

A copy—teste:

GEO. K. TAYLOR, *C. C.*

29 WEBBER, J. T.
vs.
COMMONWEALTH OF VIRGINIA.

To the honorable judges of the Supreme Court of the United States:

The petition of J. T. Webber respectfully represents that in a prosecution in the State of Virginia, wherein he was plaintiff in error and the State of Virginia was defendant in error, in the highest court of

the State in which a decision in the prosecution could be had, there is drawn in question the validity of a statute of, or an authority exercised under the State on the ground of its being repugnant to the Constitution of the United States, and a title, right, privilege, or immunity is claimed under the Constitution, to wit:

Under the eight' section of the first article thereof, providing that the Congress of the United States shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." And also, shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," as appears by the petition to the said highest court of
30 the said State set forth in record, and as appears by other parts of said record.

The statute whose validity is disputed and denied is in the following words and figures, to wit:

"Any person who shall sell or offer for sale the manufactured articles or machines of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or take orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or Territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles, through the agency of another; but a separate license shall be required from any agent or employee who may sell or offer to sell such articles for another. For any violation of this section, the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offence. The specific license tax upon an agent for the sale of any manufactured article or machine of other States or Territories, shall be twenty-five dollars; and this tax shall give to any party, licensed under this section, the right to sell the same within the county or cor-
31 poration in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons, other than resident manufacturers or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section."

And your petitioners show that, on the 19th day of August, 1880, there was a final judgment in said suit in the said highest court of the State, and the decision is in favor of the validity or constitutionality of said statute of, or authority exercised under the State, and is against the titles, rights, privileges or immunities so specially set up or claimed by your petitioner under said Constitution.

Wherefore your petitioner prays for a writ of error (with a citation duly signed), on good and sufficient security being taken, in order that said judgment may be re-examined, and reversed or affirmed in the Supreme Court of the United States.

December 6th, 1880.

J. T. WEBBER, *Petitioner*,
By JOHN. A. MEREDITH AND
MEREDITH & COCKE, *Counsel*.

32 The United States of America to the State of Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on

the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein J. T. Webber is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty.

M. R. WAITE,
Chief Justice U. S.

33 On this 21 day of December, in the year of our Lord one thousand eight hundred and eighty, personally appeared C. V. Meredith before me, the subscriber, clerk of the circuit court of the United States for the eastern district of Virginia, and makes oath that he the within citation to the attorney-general of Virginia, together with a copy thereof, and that he received this, the original citation, from him, with the below-written acknowledgement of service written thereon, and signed as below.

Sworn to and subscribed the 21st day of December, A. D. 1881.

M. F. PLEASANTS,
Clerk U. S. Circ't Court Ea. Dist. Va.

I, on behalf of the State of Virginia, acknowledge service of a copy of the within citation on me, Dec. 20th, 1880.

JAS. G. FIELD,
Att'y Gen'l of Va.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. T. Webber, plaintiff in error, and the State of Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such

35 their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice U. S.

36 CLERK'S OFFICE OF SUP. C'T OF APPEALS OF VA.,
Wytheville, Dec. 23d, 1880.

I, Joseph W. Caldwell, clerk of the supreme court of appeals of the State of Virginia, at Wytheville, do hereby certify that a copy of this writ of error was filed in my office at Wytheville aforesaid, on this the 23d day of December, 1880.

JOS. W. CALDWELL,
Clerk of Sup. C't of Appeals of Va. at Wytheville.

37 Know all men by these presents, that we, J. T. Webber and J. S. Finkenbiner, are held and firmly bound unto the State of Virginia in the full and just sum of two hundred and fifty dollars, to be paid to the said State of Virginia, her certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 15th day of December, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at a supreme court of appeals of the State of Virginia, held at Wytheville, in the county of Wythe, in a suit depending in said court, between J. T. Webber, plaintiff in error, against the Commonwealth of Virginia, a judgment was rendered against the said J. T. Webber, and the said J. T. Webber having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Virginia, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said J. T. Webber shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN T. WEBBER. [L. S.]
J. S. FINKENBINER. [L. S.]

Sealed and delivered in presence of—
C. V. MEREDITH.

Approved by—

M. R. WAITE,
Chief Justice U. S.

38 IN CLERK'S OFFICE OF THE UNITED STATES CIRCUIT COURT AT RICHMOND, VIRGINIA,
Richmond, Dec. 15, 1880.

I hereby certify that the parties to the within bond are worth the penalty thereof, and that the sum therein named can be made out of them by due process of law.

M. F. PLEASANTS,
Clerk U. S. Circ't Court Ea. Dist. Va.

CLERK'S OFFICE SUP. CT OF APPEALS OF VA.,
Wytheville, Dec. 23d, 1880.

I, Joseph W. Caldwell, clerk of the supreme court of appeals of Virginia, at Wytheville, hereby certify that a copy of this bond has been taken & filed in my office, at Wytheville aforesaid, this 23d day of December, 1880.

JOS. W. CALDWELL,
Clerk of Sup. Ct of Appeals of Va., at Wytheville.

(Indorsed:) Webber *vs.* Com. of Va. Transcript of record.

(Indorsement on cover:) No. 1136. J. T. Webber, plaintiff in error, *vs.* The State of Virginia. Virginia sup. court of appeals. Filed 3rd January, 1881.

OFFICE SUPREME COURT U.S.
FILED
FEB 23 1881
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

WEBBER, J. T.
vs.
COMMONWEALTH OF VA. } *Brief for Plaintiff in Error.*

MEREDITH & COCKE, Counsel.

IN THE

Supreme Court of the United States.

WEBBER, J. T., *vs.* STATE OF VIRGINIA.

This cause comes before the court upon a writ of error to a judgment of the supreme court of appeals of Virginia sitting at Wytheville, Va.

STATEMENT OF CASE.

The following is a statement of the case, so far as is necessary for a proper hearing of it by this court.

In June, 1880, the plaintiff in error was indicted in the county court of Henrico county for a violation of the 45th and 46th sections of the revenue laws of Virginia. The said sections are in the following words:

"45. Any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles for another. For any violation of this section the person offending shall pay a fine of not less than fifty dollars, nor more than one hundred dollars for each offense.

"46. The specific license tax upon an agent for the sale of any manufactured article or machine, of other States or Territories, shall be twenty-five dollars; and this tax shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the coun-

ties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons, other than resident manufacturers, or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section." See Acts of Assembly, 1875–76, ch. 162, p. 184.

That when tried under said indictment it was proved that he sold the sewing machines, therein mentioned, as agent of the Singer Manufacturing Company; that the machines were made beyond the limits of Virginia, and were made by the said company under a patent granted on the 22d day of April, 1879, to William C. Hicks, by the United States of America, which had been duly assigned by the patentee to the said company.

But notwithstanding Webber's defenses, (two or which defenses will be hereinafter set forth,) he was convicted, and it was adjudged that he pay a fine of fifty dollars and costs. He appealed from said judgment to the Henrico circuit court, and again made the defenses above alluded to. But the latter court sustained the judgment of the county court. He then appealed to the highest court of the State, and there he made the same defenses, and met with the same fate; for this last court upheld and affirmed the said judgments of the lower courts. It is only necessary to mention here two of the three defenses he made in the State courts, for the omitted one was solely as to the proper construction of the statute.

ASSIGNMENT OF ERRORS.

The judgment of the supreme court of appeals of Virginia should be reversed by this court upon the following grounds—which were the grounds of defense above alluded to:

I.

Because the said sections of the statute are in derogation of clause 8, section 8, article 1, of the Constitution of the United States, which provides that, "The Congress shall have power—To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their separate writings and discoveries."

II.

Because the said sections of the statute are in derogation of clause 3rd, section 8th, article 1 of the Constitution of the United States, which provides that "the Congress shall have power—To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

BRIEF FOR PLAINTIFF IN ERROR.

The errors assigned will be noticed in the order in which they have been stated. The question raised by the first assignment of error may be briefly stated thus: "Has a State the right to tax, directly or indirectly, the *privilege of vending*, granted in a patent to the assignee of a patentee?"

It was proper to include in the above question a query as to the right of a State to impose such a tax indirectly. The statute here complained of, naturally suggests the extent of the question. For it is evident that the said statute does not tax *eo nomine* the privilege granted under a patent. Yet it is equally clear that the statute does in effect and in fact reach and tax the said privilege. It is in truth just such a statute as called forth the remark of Chief Justice Marshall in *Brown* vs. *Maryland*, 12 Wheat., p. 444, that "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing."

Such language implies—and it should require but little thought for one to see—that if a State has not the right to tax an article, or a species of property directly, it cannot have the power to thus burden it indirectly. For surely the law does not seek to reward subterfuge, nor give a premium for pretense. Indeed the perfection of legislation is a direct purpose, clearly defined. And in no class of laws is this more devoutly to be wished for than in those imposing taxes. And in truth this court has already decided that the question of the constitutionality of a State law cannot, in a case like this, depend upon the *manner* of the imposition. It must depend upon the *power* of the State over the subject-matter. *Bk. of Com.* vs. *N. Y. City*, 2 Black, pp. 630 and 631.

That decision of this court narrows the question to the right of the State to impose the tax directly. And there is not lacking upon this latter question decisions of this court, that, if not expressly conclusive of it, at least by implication determine it.

As early as the case of *McCullough* vs. *Maryland*, this court laid down the cardinal test of a State's right to impose a tax. It said, "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation, &c. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission. 4 Wht., 429. This principle was reäffirmed in *Weston* vs. *City Council of Charleston*, 2 Peters, p. 467; and again in *Bk. of Com.* vs. *N. Y. City*, *supra*.

Examined in the light of this test, the right of the State to impose the tax depends upon whether the "privilege of vending" is one of the subjects which exists by the State authority, or "is introduced by its permission." As to the said privilege existing by the authority of the State of Virginia, it is sufficient to say that that State does not assume to grant patents. Hence, it is needless to stop to discuss her right to issue such grants. Nor is the privilege introduced "by its permission." We have seen that Virginia does not assume to grant patents. This being true, she could only derive her power over that subject from the common law. In the able and eloquent discussion of the case of *Gibbons* v. *Ogden*, 9 Wht., it was attempted to get this court to hold that a State did, by right of common law, have power to grant patents to inventors. In that case the court did not see fit to decide the question. But when the same position was presented and pressed in a later case, this court decided that a State has no such right at common law. *Gayler & al.* v. *Wilder*, 10 How., page 494. It follows, then, that tried by the test as announced above, a State has no power over the subject matter, and hence no authority to tax it.

But may we not go further, and show that a State is *prohibited* from taxing the privileges granted under a patent?

If patent-rights do not owe their existence to State statutes, or to the common law, what is their origin? They arise under clause 8, sect. 8, art. 1 of the Constitution of the United States. By virtue of that clause the past and present acts of Congress were enacted, granting to inventors "the exclusive right of making,

using and vending" their inventions. "The constitution and law, taken together, give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent." *Evans* v. *Jordan & als.*, 1 Brock, 252. Or as elsewhere expressed, "certainly the right of the patentee springs wholly from the general government"—3 Comst., p. 18.

Thus it is seen that not only does a State not possess the power at common law, nor by her own statute, but it is apparent that in the United States alone is lodged the power over patent rights. It was "entirely delegated to the Government of the Union" by the said clause of the constitution. 1 Brock, p. 250. This being true, surely a State can only by unjust usurpation tax such a subject. For can it require argument to show that where a State has surrendered all power over a subject to a higher authority it cannot undertake to exercise over that subject a power that only belongs to a sovereign—the power of taxation. Indeed, where States have attempted to enforce taxation in other cases, under similar circumstances, this court has decided that it was exercising the power by might and not by right. For in that section, by other clauses, other powers were given, either directly or by implication, to the Union; and it was in speaking of that section that this court said: "The States have no power, *by taxation* or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution *the powers* vested in the general government." *McCulloch* v. *State of Maryland*, *supra.*; *Weston* v. *City Council of Charleston*, *supra.* Such is the language of this court in speaking of ALL "the powers vested in the general government." No distinction is drawn between any of the said powers. They are all treated as if each was entitled to equal protection from burdens imposed by States. It virtually says *not one* of the powers can be retarded, impeded or burthened by State taxation. And as to many of these powers the court has been called on to say whether they can be retarded, impeded or burthened by State interference. The following are some of the cases in which the question has been raised:

In *McCulloch* v. *Maryland*, 4 Wht., the power of a State to tax a branch of United States Bank, was drawn in question.

In *Brown* v. *Maryland*, 12 Wht., the power of a State to tax imports was denied.

In *Gibbons* v. *Ogden*, 9 Wht., the power of a State to grant to certain persons the exclusive right of navigation upon rivers was disputed.

In 6 Wall., *Steamship Co.* v. *Portwardens*, p. 31, the power of a State to impose a tax upon tonnage was brought in controversy.

In *Ward* v. *Maryland*, 12 Wall., the power of a State to put a discriminating tax upon non-residents was objected to.

In case of State Freight Tax, 15 Wall., the power of a State to impose a tax upon freight carried through a State, or from one State to another, was questioned.

In each and all of these cases, calling into question the right of a State "to retard, impede, or burthen, or in any manner to control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government," this court unhesitatingly decided against the State, and in favor of the general government, and held the State laws to be unconstitutional and void. Upon what possible fancy then can it be expected that, as to the power here drawn in question, this court will hesitate to decide that the statute here complained of is unconstitutional and void. Is it not a law, that in its scope and effect retards, impedes and burthens the operation of one of the "constitutional laws" enacted by Congress to carry into execution one of the powers vested in the general government? It undoubtedly does burthen the power vested, as is seen in this case. And it impedes and retards the operation of one of the laws passed to carry into effect the said power. The language of the court in the case last cited, shows that the statute here assailed, is of just the nature to burden the said power. For the court, in designating what may be a burden, specially mentioned "taxation."

Can the expectation above alluded to, if there be one, be based on the belief that the power involved is not an important one, and that the general government will not at this late day be very tenacious of its rights. There are two answers that would soon dispel such a delusion.

1st. That one, who claims a right, which has arisen under the exercise of this power, now calls for protection against one, who is without lawful authority injuring that right.

2nd. That its immense importance must be known to every one

who is but slightly acquainted with American industry, American enterprise and American progress.

We may confine ourselves to an examination of only this second reason. Its importance, and, therefore, the construction to be put upon the clause of the constitution granting this power, can be more accurately ascertained by looking "to the history of the times, and examine the state of things existing when it was framed and adopted to ascertain the old law, the mischief and the remedy"—*Rhode Island* vs. *Mass.*, 12 Peters, 658 and 722. Such is the rule of construction announced by this court. Fortunately we can get an insight into "the state of things existing when it was framed," for we have cotemporaneous writings setting forth the importance of this power.

For *The Federalist*, after speaking of copyrights, says: "The right to useful invention seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases," &c.—Number 43rd. Or, coming down to a later period in the history of the United States, we find that the language of Wm. Wirt, in *Gibbons* vs. *Ogden*, 9 Wht., pp. 166 and 167, accurately and forcibly sets forth the reasons for the granting of this power to the general government. His language is worthy of being quoted, for he speaks therein not merely as the eloquent advocate, but also as the accurate historian: "Why was it thought a matter of *sufficient importance* to confer this power upon the national government? The answer to this question would be found in the history of the country, in the nature of our institutions, and the great national objects which the constitution had in view. The country was in its infancy, its population was small, its territory immense; it had recently thrown off its bondage by the war of the revolution, and was left exhausted and poor, &c. It was still dependant on the arts of Europe for all the comforts and almost all the necessaries of life. We had hardly any manufacutories, science or literature of our own. Our statesmen saw the great destiny which was before the nation, but they also saw the necessity of exciting the energies of the people, of invoking the genius of invention, and of creating and diffusing the lights of science. These were objects in which the whole nation was concerned, and were, therefore, naturally and properly confided to

the national government, &c., &c. Discouragement and discontent would have arisen in some States from the superior privileges conferred on the works of genius in others; contests would have ensued among them on the point of the originality of inventions, and laws of retortion and reprisal would have followed. All these difficulties would be avoided by giving the power to Congress, and giving it exclusively of the States."

And we may add, not only did he thus tell correctly the history of the granting of this power to the Union, but he was enabled, by the light of the circumstances that surrounded him in that case, to vindicate the wisdom of our statesmen in placing it where they did. For, in his eloquent reply to the classical allusion of Mr. Emmet, the opposing counsel, he told the court that, growing out of disputes over rights conferred upon inventors, there were "three States almost on the eve of war."

But we may come down later—come to the legal literature of the last decade. And in it we will find all-convincing proof of the wisdom of the framers of the constitution in delegating this power to Congress. The present statutes of Virginia are sufficient proof. There is the statute here complained of, which taxes the *privilege of vending* by an assignee of articles made under his patent. And this tax is imposed because the goods were made in another State, and although this State had already imposed upon them a merchant's tax, which had been paid. There is also upon her statute book a law taxing the sale or transfer of patent rights. And these are the laws of a State whose manufacturing interests have always been small, and who therefore has not felt strongly the inclination to prevent competition with her own manufactures. But not alone in Virginia can this law be found upon a statute book. For the reports of the decisions of the highest courts in Michigan, Minnesota, Indiana, and Illinois show that they have, for what they deemed their own interests, seen fit to pass similar laws. And it would not be rash to allege, without making an examination that other States have in like manner burdened this power. Thus we see from the above that, whether this clause be viewed in the light of expositions cotemporaneous with its passage, or subsequent thereto, its importance will readily appear. Hence the right of a State to legislate on this power will be judged of as any attempt to legislate on any other power granted to Congress would be.

What, then, have been the principles announced by this court in passing upon the questions, whether State statutes impinge upon the powers vested in Congress? As early as the case of *McCulloch* v. *Maryland*, this court denied that the right of the State to tax extended "to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." In the same case it even went so far as to hold that "*the attempt* to use" the power of taxation "on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a State cannot give." See 4 Wht., p. 430. And this doctrine of limitation as to State taxation has been twice reaffirmed in precisely this language. 2 Peters, 467; 2 Black, 632. And the same principle has been announced in other decisions of this court.

Nor has this court felt itself confined to declaring a State statute void only, when a State in the exercise of its usurpation has been oppressive. It has refused to gage the validity of a State statute by the extent to which the power has been usurped. It has held in each case that the statute was void, without regard to the question whether the burden imposed was a light or a heavy one. For, as this court has said, "it is obvious that the same power which imposes a light duty can impose a heavy one—one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised *at all* it must be exercised at the will of those in whose hands it is placed." *Brown* v. *Maryland*, 12 Wht., p. 439. And it was in negation of this view that Chief-Justice Marshall says: "But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy, &c., &c., &c. This, then, is not a case of confidence, and we must consider it as it really is." See 4 Wht., p. 431.

And there can be no doubt that the refusal of the court was right, when it held that Congress could not trust to the wisdom and justice of State governments in taxing the powers vested in the general government. A contrary decision would have conferred upon the State a power, that that State and all the other original ones had declared it should not have.

We have been obliged to discuss the question, here involved, by

the light of the decisions of this court upon similar and kindred subjects; for it has never been directly before the court except in two cases. In *Gibbons* v. *Ogden*, 9 Wht., and *Patterson* v. *Kentucky*, 7 Otto. But in neither of those cases was the decision of this question necessary—nor was a decision of it made in either case. But in several of the State courts, questions have arisen as to the right of the States to impose conditions upon the sales of privileges granted in patents. In Michigan, Minnesota, Indiana, and Illinois, the question has been raised as to the right of a State to impose a burden or attach a condition to the right of a patentee to sell and assign, in whole or in part, the rights conferred under their patents. And in Indiana the question was raised as to the right of a State to impose a condition upon a patentee's right to sell the articles made under his patent. In all of these cases it was held that, "The property in inventions exists by virtue of the laws of Congress, and no State has the right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market, anywhere within the United States, and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the Constitution. *Helm* v. *First National Bank of Huntington*, 43 Ind., 167; *Hollida & Ball* v. *Hunt*, 70 Ill., 113; *Crittenden* v. *White*, 23 Minn., 25; *Cranson* v. *Smith*, 37 Mich. 309; *Grover & Baker Sewing Machine Company* v. *Butler*, 53 Ind., 459.

These cases but adopted the decision and language of Judge Davis in *ex parte* Robinson, 2 Bissell 309.

Yet while there has been no decision of this court directly of this question, there have been remarks made by this court in several cases, in which the doctrine has been fully recognized, that a State has no right to impose any burden upon a patentee, or his assignee, for the privilege of "making, using and vending," &c. And these remarks, while not decisive, are of weight. They are not mere *obiter dicta*. They are announcements of legal principles, made to sustain and justify either as illustrations, or, by way of analogy, the

decisions in which they appear. They stand to these decisions like minor premises to logical sequences.

The first case in which the doctrine is recognized, that a State has no right to tax the privileges conferred by a patent right, is the case of *McCulloch* vs. *Maryland*, *supra*. There the court, proceeding to show by illustration that the State of Maryland could not tax the Bank of the United States, said: "If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; *they may tax patent rights*, &c., &c. This was not intended by the American people." 4 Wht. 432.

And a few years later Justice Thompson, in a dissenting opinion in *Weston & als* vs. *City Council of Charleston*, in which he intended to show the limit to the freedom above stated of the powers, said: "The broad proposition (laid down in the case of *McCulloch* vs. *the State of Maryland*) that the States cannot tax any instrument or means used by the general government, in the execution of its powers, must be understood as referring to a direct tax upon such means or instruments, &c., &c. Again, it is said the States cannot tax a patent right; but if the patentee, from the sale or use of his patent has *acquired property*, or is receiving an income, it could not be intended to say that *such property or income* cannot be taken into the estimate of his taxable property." See pp. 479, 480. With this limitation he was willing to assent to the doctrine announced, as above stated, in *McCulloch* vs. *Maryland*, that a State cannot tax the privileges conferred by a patent.

But the language of the court, in *Bloomer* vs. *McQuewan*, 14 How. 549, is still more pointed and forcible. It there says: "But the purchaser of the implement, or machine, for the purpose of using it in the ordinary pursuits of life, stands on different ground. In using it, he exercises no right created by the act of congress, nor does he derive title to it by virtue of the *franchise*, or exclusive privilege granted to the patentee, &c., &c. And when *the machine* passes to the hands of the purchaser, *it* is NO LONGER within the limits of the monopoly. It passes outside of it, and is NO LONGER under the protection of the act of Congress. The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the State in

which it is situated, &c. Like other individual property, it is THEN subject to State taxation." See also *Chaffee* vs. *Boston Belting Co.*, 22 How. 223; *May* vs. *Chaffee*, 2 Dillon 389; *Mitchell* vs. *Hawley*, 16 Wal. 548; *Adams* vs. *Burke*, 17 Wal. 456. Does not such language plainly negative the idea that the privilege of "making, using and vending the said invention or discovery" by the patentee is liable to State taxation. For the converse of the proposition above stated is, that a machine made under a patent by a patentee cannot be taxed by a State until it has been sold or transferred by the patentee. Such is the meaning of the language. What is the weight to be attached to it? Such language was not used loosely. It shows an acute perception and a well-considered opinion as to when the right of a State to tax begins in such cases. And further, we think that the fact that exactly the above quoted language has been used in several of the cases last cited, is conclusive that this court regards the principle therein announced as well settled. We submit that the converse of the proposition must be equally well settled. And hence that the tax required by Virginia was an illegal tax. For surely the "privilege of vending" is as much protected as the "privilege of using."

But it may be suggested that the power of the general government over the subject matter to the exclusion of the States is not denied; that the only question in dispute is as to the extent of the power conferred, and that the contention is, that the constitution only intended that Congress should have power to protect patentees from infringements of their patents. Let us see whether the object of the said clause of the constitution would be fully seen and admitted, if this court should hold that it was simply intended to grant to the general government the right to grant to an inventor the "exclusive right of making," &c., in the sense of allowing the general government only to decide *as to who* should have the right. In other words, that the clause was not intended to grant the power to the Union *to bestow* a privilege, but by its decision merely to *designate* the one person who should have the privilege to the exclusion of all others.

There are many objections to this construction. Among them are the following:

1st. It takes for granted as existing what this court has decided never did exist, viz: any privilege in the subject outside of the

constitution, and the laws enacted in pursuance thereof. For this court has held that the said clause of the constitution was not intended simply to "*secure*" a right, but also to *grant* a privilege—*Wheaton, &c.*, vs. *Peters, &c.*, 8 Peters, 661.

2nd. It is, to say the least, putting the narrowest construction upon a power granted to the general government for the mutual benefit of all the States. And such a construction is hardly in consonance with the decisions of this court.

The 3rd objection, and one that seems to us conclusive as to the error of such a construction, is that it would defeat the very object that would have been had in view, even were such a construction the correct one. If this be true, this court will never put a construction upon a clause of the constitution, that would render the clause futile, when there is another construction that would make it highly beneficial and effective. Would the construction suggested have the effect above set forth? The object of the clause, as set forth in itself, was to promote the sciences and to secure to inventors their inventions. It must be apparent that neither of these objects would be effectively secured by the construction we are now noticing. The patentee would be completely at the mercy of the States. They might impose upon him any burden they saw fit, from the lightest tax to one amounting to prohibition. And thus the "exclusive" right granted him by the patent would be useless and ridiculous. For in the policy of exclusion the States might go a step farther and virtually exclude the patentee from the benefits that might be derived from the invention.

And what case can more properly show than this one, the extent to which States might burden the rights conferred by a patent, no matter what those rights may be? It shows that the States may usurp the power to burden in its most dangerous tendency—that of imposing taxes. For in what way could a State attack a patent right more effectively than by taxing it? In none! For we know "that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create." 4 Wht., 431. Indeed, the record shows that upon all the machines made by the Singer Company, as assignee of the patent, and brought into the State of Virginia, a tax had been paid. And yet it appears that the State was not satisfied with this, for the supreme court of Virginia, in this very case, held that

that tax was not the only one that could be imposed and required before the assignee or his agents could sell throughout the State. It held that a further tax could be imposed upon the personal *privilege of vending* the same articles. Now, if it be allowed to tax the privilege of vending, why may it not tax separately the privilege of making, and also the privilege of using? For "the right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee." *Adams* v. *Burke*, 17 Wall., p. 456.

Surely "the power to tax involves the power to destroy." These suggestions must show that the narrower construction would defeat the very object of the clause, viz: the securing to inventors the exclusive right to their inventions. Surely then that construction must be erroneous. Otherwise this court would have to decide—

1st. That a State has a right to burden and impede a law passed in pursuance of a power delegated to the United States.

2nd. That a State can tax one of the means or instruments used by the general government in the execution of its powers.

3rd. That a State may tax and defeat a franchise granted by the United States, in accordance with the constitution.

We submit that this court is not prepared to make such a decision. We submit that our construction of the clause of the constitution is the correct one. And we further submit that we were improperly convicted, because we were not liable to the tax required by the State statute.

The remaining error assigned in this case is, that the statute violates clause 3rd, sect. 8th, art. 1st of the constitution of the United States, which grants to Congress the power to regulate inter-State commerce.

This question needs but little argument, for the principles therein involved are too well settled by this court. In the State court we relied upon a decision of this court, that we thought was conclusive of this question. We referred the court to the case of *Welton* v. *The State of Missouri*, 1 Otto, 275. In that case, speaking of the power of Congress to regulate inter-State commerce, the court said: "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the *subject of discriminating legislation by reason of its foreign character.* That power

protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void." With this chart to guide us in the construction of the statute here complained of, there can be but little difficulty in deciding whether the statute is void or not. The simple question to be decided is, whether the sewing machines mentioned in the indictment were, as to that statute, "the subject of discriminating legislation by reason of its foreign character." A cursory reading of the Virginia statute will satisfy any one that its primary object was to burden foreign manufacture to the advantage of home-made articles. It is true that in the 46th section it says: "All persons, other than resident manufacturers or their agents, selling articles manufactured in this State," &c., shall pay the same tax.

But it will be seen, that even this language, which put something of a burden on home-made articles, only more clearly points the discrimination. For it shows that, as to foreign articles, the seller, in order to be relieved of the tax, must be the owner of the goods, and must be taxed as a merchant; while as to home-made articles, one may sell them without the license, if he be a resident manufacturer. And this discrimination will appear more palpable when it is remembered that a resident manufacturer pays no license tax whatever. This fact is admitted in the opinion of the supreme court of appeals of Virginia. See Record, p. 7.

Here then is a discrimination. It is true, there could have been a larger one. But the extent of discrimination is of no importance. The question always is, whether there has been any discrimination at all or not. For, otherwise, a question of constitutionality would be solved only by measuring how much confidence Congress can put in the different States. This standard of construction has been rejected by this court. 4 Wht., p. 431.

There being a discrimination, the statute must be void as to us. And hence we again submit that we were improperly convicted.

In the light of the above principles and decisions, the plaintiff in error expects that the decision of the supreme court of appeals of Virginia will be reversed.

MEREDITH & COCKE,
Counsel for Webber.

OFFICE SUPREME COURT U. S.
FILED
MAR 5 1881
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT OF THE U. S.

J. T. WEBBER

vs.

THE COMMONWEALTH OF VIRGINIA.

BRIEF OF ATTORNEY-GENERAL OF VIRGINIA.

The facts of this case will be found, certified by the judge of the county court of Henrico, in bill of exception No. 1, at pages 15 and 16 of printed record.

The only question this court can consider is whether or not the conviction of J. T. Webber, under the 45th section of chapter 152 of the Acts of the General Assembly of Virginia, 1875–6, was improper, because said section of said act is repugnant to the Constitution of the United States.

The said 45th section, as well as section 46 of the same act, is correctly copied into the brief of the learned counsel for the plaintiff in error at pages 1 and 2.

It is insisted by the learned counsel that the conviction of the plaintiff in error was erroneous, because section 45 of the Virginia statute is in violation of clause 8, section 8, article 1 of the Constitution of the United States, and also of clause 3 of same section of same article of said Constitution.

As to this second assignment of error, I shall have little to say. It is, perhaps, my fault or my misfortune, but I cannot perceive that section 45 of the Virginia statute infringes in the slightest degree, remotely or proximately, upon that clause of the Federal Constitution which gives to Congress the exclusive right and power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The Singer manufacturing company did not claim or pretend that it was in Virginia carrying on commerce among the states, under the protection of section 8 of article 1 of the United States Constitution. It claimed that it was a resident merchant in Virginia, doing business as such under a license granted by the Virginia authorities upon its request, and for which it paid the sum of $322. See certificate of facts at page 16 of record. Its place of business fixed by itself was No. 821 east Main street, in the city of Richmond. It is most remarkable, if this company had opened to it and its traffic, by the said section of the Constitution, the territory of all the states, it should seek from an inferior jurisdiction a license to do that which congress alone, as the superior jurisdiction, had the right to regulate. If this pretension can be sustained, then the state government can impose no tax upon merchants doing business within state limits, but whose goods, wares, and merchandise are brought in from foreign countries or from other states of the Union. The states cannot prohibit the introduction of goods, or even prescribe rules by which the importation is to be regulated, but it has the right to impose a tax upon the business of its resident merchants, who buy and sell these goods. The largest portion of goods sold in any state are not the fabrics or manufactures of the state in which the sale is made, but are brought in from another state, or from foreign countries. To hold that merchants in a state dealing in such goods are not liable to taxation by the state, is to deprive the state of nearly all the revenue derived from the taxation of merchants. The right of the state, says Justice Field, in delivering the opinion of the court in Wilton vs. State of Missouri, 91 U. S. Reports, p. 278, "to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. I also invite your honors' attention to the opinion of the court in Machine Company vs. Gage, delivered by Mr. Justice Swayne, and to the cases cited by him, 100 U. S. Reports, p. 676.

The agent, Webber, it will be conceded, I suppose, could exercise only such rights as his principal had as a regularly licensed merchant in Vir-

ginia. Section 6 of chapter 34 of the Code of Virginia, edition of 1873, p. 321, is as follows:

"Every license granting authority to engage in or exercise any business, employment, or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment, or profession, at some specified house or other definite place within the district of the assessor or commissioner granting it. Engaging in or exercising any such licensed business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without a license. A license which does not specify such house or definite place where business, employment, or profession is limited thereto by law, shall be deemed to be void."

Under their license the Singer manufacturing company had the right, by itself or its agents, to conduct the business of merchants in the house No. 821 east Main street, Richmond, and also, having paid as much as $100 tax, to sell throughout the state, by itself or its agents, by sample, its goods and wares. These are all the rights said company had. These are all its agent, Webber, could exercise. He could have sold and delivered its goods to all customers and buyers at its storehouse in the city of Richmond, and he could have gone into the counties of the state with a sample machine, and sold to all buyers similar machines, to be afterwards shipped to the purchasers. Here then was the most ample opportunity to supply every person in the state, desiring to purchase, with the machines of the Singer company. Under this authority conferred by the state law, the patentee, assignee, and manufacturer had fair opportunity of realizing all the profit they were entitled to out of the invention, or the manufacture of the particular machine. Here was fair opportunity for inventive genius to reap all the rewards that the Constitution of the United States intended to secure for its encouragement. Webber was not content to confine his operations within these prescribed and just limits. The offence of which he was convicted lies outside of these.

I respectfully submit that the 45th section of the Revenue Laws of Virginia, does not violate the 8th section of article 1 of the Federal Constitution, in relation to foreign and interstate commerce. The first ground of error insisted upon by counsel for plaintiff in error is, that the 45th section of the Revenue Laws of Virginia is in derogation of the 8th clause of section 8 of article 1 of the Constitution of the United States, which provides that "Congress shall have power

to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their separate writings and discoveries." I do not think this assignment can be sustained. The 45th section does not seek to deprive the inventor of the benefit of his patent. It makes no special reference to patented machines. The law is a general one, imposing a tax upon the agency business within the state.

Agents selling manufactured machines, whether patented or not, are required to be licensed, and by the 46th section this requirement is made of agents selling machines manufactured within the state, as the 45th section requires it of agents selling machines manufactured in other states. There is no discrimination in favor of the agent selling home manufactures and against the agent selling manufactures of other states. There is substantial equality. The results of inventive genius are not taxed at all, as is clearly shown in the able opinion of Judge Staples. The state does not tax the wheat, corn, meat, &c., grown in the state, or grown out of and brought into the state. But it does tax merchants and mercantile agencies in the state buying and selling these productions.

The laborer, who by the sweat of his brow produces the grain, has as much right to sell it untaxed as the man whose mind invents a machine has the right to sell that untaxed. There being this difference, that the producer of the grain must encounter the competition of all other producers, while the inventor has under the laws of congress an absolute monopoly in his invention for a limited time. So far as the mere sale of the grain by the producer, and of the machines by the inventor, there is and should be no difference whatsoever. This 45th section has been substantially the law of the state for many years, and has never before been objected to or deemed a hardship.

The learned counsel in their able and elaborate brief have cited and commented upon many authorities. But I think there is nothing in the authorities cited in conflict with the views taken by Judge Staples, Judge Wellford, and myself, of this case. Nor do those authorities sustain the assignments of error made by the learned counsel.

The plaintiff in error might have been indicted and convicted upon the facts of this case in the courts of Virginia as a pedlar without license. Then the case would have been exactly the case of the Machine

Company vs. Gage, 10 Otto, p. 676. The principles enunciated in that case are, I think, conclusive of this.

The very able opinions of Judge Staples, of the supreme court of Virginia, found at pages 2–8 of record, and of Judge Wellford, of the circuit court of Henrico, found at pages 19–24 of record, render it unnecessary for me to present a more elaborate brief. I most respectfully invite the attention of the court to these opinions and cases cited by them, as I consider them conclusive of the questions involved.

JAS. G. FIELD,
Attorney-General of Virginia.